IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ADRIENNE KISH, Plaintiff,	:	
v.	:	CIVIL ACTION
LARRY G. MASSANARI, Acting Commissioner of the Social Security Administration, Defendant.	:	NO. 00-CV-1765

Memorandum and Order

YOHN, J. October ____, 2001

Pursuant to 42 U.S.C. § 405(g), plaintiff Adrienne Kish ("Kish") seeks judicial review of the final decision of the Commissioner of Social Security ("Commissioner") denying her claim for disability insurance benefits ("DIB") under Title II of the Social Security Act. The parties have filed cross-motions for summary judgment, which were referred to Chief Magistrate Judge James R. Melinson, who recommended that Kish's motion for summary judgment be denied and the Commissioner's motion be granted. Kish has filed her objections to the report and recommendation. Because the Commissioner's decision is supported by substantial evidence in the administrative record and because the Commissioner has not committed any of the errors of law suggested by Kish, I will approve and adopt the Chief Magistrate Judge's report and recommendation.

I. Background

The factual background and procedural history of this case are fully set forth in the Chief Magistrate Judge's report and recommendation, and I incorporate them here by reference. *See* Report & Recommendation at 1-9.

II. Standard of Review

It is not the task of this court to undertake a de novo review of the Commissioner's decision.[1] *Schwartz v. Halter*, 134 F. Supp.2d 640, 647 (E.D. Pa. 2001). Indeed, the factual findings of the ALJ must be accepted as conclusive, provided that they are supported by "substantial evidence." 42 U.S.C. § 405(g). This court's role is thus to determine whether there is "substantial evidence in the record" to support the ALJ's denial of DIB. *Adorno v. Shalala*, 40 F.3d 43, 46 (3d Cir. 1994). "Substantial evidence" is evidence that "a reasonable mind might accept as adequate to support a conclusion" after reviewing the entire record. *Id.* (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

III. Discussion

Under the Social Security Act ("the Act"), a claimant is entitled to DIB "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. §

[1] Contrasted with this treatment is that afforded the report and recommendation of the Chief Magistrate Judge, which is reviewed de novo. 28 U.S.C. § 636(b)(1)(C).

423(d)(2)(A). Given the highly individualized nature of this calculus, the Act requires that DIB eligibility determinations be made on a case by case basis, and that a hearing be conducted as a means of adducing evidence regarding the claimant's condition. 42 U.S.C. § 405(b)(1); *Heckler v. Campbell*, 461 U.S. 458, 467 (1983) ("[T]he regulations properly require the Secretary to make these findings on the basis of evidence adduced at a hearing."). Based on the evidence gathered, the Commissioner is to evaluate whether the claimant qualifies for benefits under the Act.

Pursuant to the authority vested in it by the Act, 42 U.S.C. § 405(a), the Social Security Administration ("SSA") has promulgated regulations delineating the specific five-step process by which this eligibility determination is made. *See generally Sykes v. Apfel*, 228 F.3d 259, 262-63 (3d Cir. 2000). First, the Commissioner must determine whether the claimant is currently engaged in substantial gainful activity. 20 C.F.R. § 404.1520(b). If so, then she will not be considered disabled. If not, the second step is to discern whether she has a "severe impairment which significantly limits . . . her physical or mental ability to do basic work activity . . . ." 20 C.F.R. § 404.1520(c). If she is severely impaired, the third step is to determine whether that affliction "meets or equals criteria for a listed impairment or impairments" in 20 C.F.R. Pt. 404, Subpt. P, App. 1 (1999). 20 C.F.R. § 404.1520(d). If so, a finding of disability is directed. If not, it is necessary to proceed to step four, where it is determined whether the claimant "retains residual functional capacity to perform past relevant work." 20 C.F.R. § 404.1520(e). If she is capable of performing her past work, a finding of not disabled is directed, but if not, the final step is to determine whether "there is other work in the national economy that the claimant can perform." *Sykes*, 228 F.3d at 263; *see also* 20 C.F.R. § 404.1520(f). In making

this determination, the Commissioner is to consider the claimant's residual functional capacity, age, education, and past work experience. *Id.*

In this case, the ALJ found that Kish had not engaged in substantial gainful activity since July 23, 1993. Finding # 2. He also found that Kish suffered from chronic pain syndrome secondary to chronic lumbar and cervical nerve root irritation with radiculopathy, and that this qualified as a "severe impairment." Finding # 3. Although he recognized that she also claimed to be afflicted with left hand paresthesia and numbness, and with mild to moderate depression, he concluded that these afflictions did not rank as "severe." *Id.* He next found that Kish's chronic pain and radiculopathy did not qualify as an impairment or combination of impairments listed in, or medically equal to one listed in, 20 C.F.R. Pt. 404, Subpt. P, App. 1 (1999). Finding # 4. He further found that Kish was not precluded from lifting ten pounds frequently, standing or walking off an on for roughly two hours, and sitting for approximately six hours, though her capacity to work was further limited by the need for employment where she could alternate standing and sitting. Finding #6. Based on this assessment of her condition, he concluded both that Kish was able to perform her past work as a filing secretary, and that there are additional jobs that exist in significant numbers in the national economy that she is capable of performing. Finding # 8. Consequently the ALJ denied her claim for disability benefits.

Kish raised three primary objections to the ALJ's decision before the Chief Magistrate Judge. First, she alleged that the ALJ failed to properly evaluate the medical opinions of her treating physician. Specifically, she contended that 1) the ALJ improperly failed to afford controlling weight to the opinion of her primary treating physician, Dr. Richard Kaplan; 2) the ALJ incorrectly interpreted Kaplan's report; 3) the ALJ failed to discuss all of Kaplan's opinions;

and 4) the ALJ failed to point to contrary medical evidence in disregarding Kaplan's opinion. Plaintiff's Motion for Summary Judgment ("Pl.'s Motion") at 14-24. Second, she asserted that her back condition qualifies as Listing 1.05(C) *Disorders of the Spine - Other Vertebrogenic Disorders* in 20 C.F.R. Pt. 404, Subpt. P, App. 1 (1999). Pl.'s Motion at 24-26. According to Kish, the ALJ committed reversible error in failing to mention this specific listing in his report, and in failing to provide any explanation for his determination that her condition was not of listing level other than a mere conclusory statement indicating the same. Third, she alleged that the ALJ's failure to properly evaluate her residual functional capacity resulted in his posing a flawed hypothetical question to a vocational expert who testified at the hearing. Pl.'s Motion at 26-29. For all of these reasons, Kish claims that the ALJ's findings were unsupported by substantial evidence.

In his report and recommendation, the Chief Magistrate Judge concluded that Kish's allegations of error in the Commissioner's decision were without merit. Kish filed written objections to this report and recommendation. In reviewing the ALJ's ruling in this case, I have independently reviewed the entire administrative record, the report and recommendation, Kish's objections thereto, and each of the parties' other submissions. I will address Kish allegations of error in the ALJ's determination seriatim.

A. The ALJ's Alleged Failure to Properly Evaluate the Opinion of Kish's Treating Physician

1. The ALJ's Failure to Afford Controlling Weight to the Opinion of Kish's Primary Treating Physician

Kish's first allegation of error is that the ALJ improperly failed to afford

controlling weight to the opinions of Dr. Kaplan. In support of this contention she stresses that Kaplan repeatedly opined that she is disabled, Pl.'s Motion at 16, and that the ALJ failed to point to any contrary medical evidence in "dismissing"[2] Dr. Kaplan's opinions. Plaintiff's Brief in Reply to Defendant's Brief in Support of Defendant's Motion for Summary Judgment ("Pl.'s Reply Brief") at 7.

In DIB eligibility determinations the opinion of the claimant's treating physician is to be afforded significant weight. *Fargnoli v. Massanari*, 247 F.3d 34, 43 (3d Cir. 2001) (citing *Cotter v. Harris*, 642 F.2d 700, 704 (3d Cir. 1981) and 20 C.F.R. § 404.1527(d)(2)). This is so because treating physicians:

> are likely to be the medical professionals most able to provide a detailed, longitudinal picture of [the claimant's] medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations.

20 C.F.R. § 404.1527(d)(2). However, such an opinion will not be given controlling weight

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[2] In her motion for summary judgment, Kish asserts that "[t]he ALJ accorded *no* weight to the opinions of . . . Dr. Kaplan." Pl.'s Motion at 15 (emphasis added). Yet the ALJ did not completely disregard Dr. Kaplan's opinion. Rather he stated that "the persuasive weight assigned to Dr. Kaplan's opinion is limited to the extent that it is supported by objective medical evidence and to the extent that the claimant's subjective limitations are found to be persuasive." ALJ's Decision at 6. Indeed, it is not that Kaplan's opinion was wholly disregarded–it simply was not afforded controlling weight. This is consistent with the admonition of the Third Circuit that even where a physician's opinion is not considered to be controlling, it should still be treated as having "great weight, especially 'when [it] . . . reflect[s] expert judgment based on a continuing observation of the patient's condition over a prolonged period of time.'" *Morales v. Apfel*, 225 F.3d 310, 317-18 (3d Cir.2000) (quoting *Plummer v. Apfel*, 186 F.3d 422, 429 (3d Cir. 1999)); *see also Adorno*, 40 F.3d at 47. Accordingly, not only is Kish's characterization of the ALJ's treatment of Kaplan's opinion incorrect, but moreover her arguments to the effect that an ALJ can reject outright a treating physician's opinion for only certain reasons are inapposite to what actually transpired in this case. *See* Plaintiff's Written Objections at 5-6; *infra* at 17-18.

unless it "is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record." *Id.*; *see also Fargnoli*, 247 F.3d at 43; *Plummer*, 186 F.3d at 429 (noting that "[a]n ALJ may reject a treating physician's opinion outright" based on "contradictory medical evidence").

There are two main reasons why the ALJ's failure to afford controlling weight to Dr. Kaplan's opinions was proper. First, insofar as Kaplan found Kish to be "disabled," SSA regulations preclude any "special significance" from being attributed to this conclusion. 20 C.F.R. § 404.1527(e)(1) and (3). The determination of whether a claimant meets the statutory definition of "disabled" is legal in character, and accordingly is properly made by the Commissioner, not a physician. *Schwartz*, 134 F. Supp.2d at 650 (stating that "an opinion that the claimant is disabled [is] not [a] medical opinion[]," and accordingly is not entitled to controlling weight). Second, as the ALJ discussed at length, the requisite criteria for affording controlling weight to Kaplan's medical diagnoses are unsatisfied here. In particular, Kaplan's report of Kish's total inability to work is contradicted by both his preceding and subsequent reports of her condition, and is largely unsupported by clinical findings or other objective evidence. *See* 20 C.F.R. § 404.1527(d)(2) (requiring that a controlling opinion be both uncontradicted by other substantial evidence of record and supported by clinical and diagnostic techniques).

From the inception of his treatment of Kish in September, 1993 to September, 1995, Kaplan routinely opined that, at worst, Kish was disabled from her past work as a licensed practical nurse. Tr. at 316-45, 387-91. Then, on September 7, 1995, he stated that she was "disabled from any and all employment." Tr. at 392. But subsequently, as the ALJ noted:

> in an undated residual functional capacity evaluation completed and faxed to [Kish's] representative on November 14, 1996, Dr. Kaplan reflect[ed] a residual functional capacity inconsistent with that of an individual precluded from all work activities.[3] Specifically, Dr. Kaplan indicates that the claimant is able to lift up to 20 pounds occasionally[,] sit up to three hours, stand/walk three to five hours, alternating positions at ½ hour intervals. There were no limitations with the claimant's use of her hands or feet. Postural movements were limited to occasional bending, reaching and kneeling, with all others being precluded. Some environmental restrictions were also noted without any supporting documentation. Subsequent reports from Dr. Kaplan indicate that the claimant is doing well on medication and her condition is stable.

ALJ's Decision at 5-6. In essence, Kaplan's assessment of Kish's physical capacity oscillated between her being able to engage in limited types of employment, to not being able to work at all, and then, at least implicitly, back. In other words, Kaplan's opinions were inconsistent with each other. Yet, as stated, consistency with other evidence of record is a prerequisite to affording controlling weight to a treating physician's opinion. *See Jones v. Sullivan*, 954 F.2d 125, 129 (3d Cir. 1991) ("In light of such conflicting and internally contradictory evidence, the ALJ correctly determined that the opinions of Jones's treating physicians were not controlling.").

The ALJ went on to note that "Dr. Kaplan has not provided any additional clinical findings to support his statement in September 1995 that the claimant is totally disabled." ALJ's Decision at 6. It is true that Kaplan stated on September 7, 1993 that an EMG report indicated "a left mild C6-7 chronic root irritation and left mild L4-5 bilateral mild L5-S1 chronic root irritation." Court Transcript ("Tr.") at 343. However this diagnosis previously had supported

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[3] I note that an independent residual functional capacity assessment performed on January 27, 1994 by Dr. Sharon A. Wander, M.D., also is inconsistent with Kaplan's September 7, 1995 opinion in that it too indicates Kish's capacity for gainful employment. Tr. at 121-28. Dr. Wander opined that Kish was capable of frequently lifting twenty-five pounds, and of standing, walking or sitting for about six hours in an eight hour work day. *Id.* at 122. While this assessment did antedate Kaplan's finding of complete disability by roughly a year and a half, it is fairly consistent with his subsequent assessment of November 14, 1996.

several opinions that viewed Kish's capacity for employment to be more expansive than did the report issued on September 7, 1995. Kish points to another EMG, conducted in 1996, and an MRI performed on February 14, 1994 as the requisite objective evidence of Kish's total disability. These tests revealed, respectively, "chronic and ongoing radiculopathy" and "central spondylitic discs at C4-5 and C5-6 with mild to moderate indention upon the thecal sac and L4-5 central herniated disc mildly indenting upon the thecal sac." Pl.'s Motion at 15 n.19. Yet the ALJ credited Kish as being afflicted by both of these conditions, and specifically mentioned the MRI as the source of the latter diagnosis. *See* Finding # 3 (finding that Kish is afflicted with "chronic and ongoing L5-S1 radiculopathy" and labeling this condition as "severe"); ALJ's Decision of January 4, 1997 at 3 (crediting the results of the 1994 MRI).[4] However, after a reasoned consideration of these conditions in conjunction with the other evidence of record, the ALJ did not find them to be indicative of her total disability. Because this determination was based upon substantial evidence, as explained more fully below, these procedures fail as objective support for Kaplan's finding of Kish's total incapacity for work.

Rather, the ALJ found Kaplan's conclusion as to Kish's total disability to have been based predominately upon her reports of pain. ALJ's Decision at 6. It is unquestionably true that subjective complaints of pain are a consideration that must be–and were in this case–afforded a substantial degree of weight in making the ultimate determination of whether a claimant is disabled. *Ventura v. Shalala*, 55 F.3d 900, 903 (3d Cir. 1995); *Mason v. Shalala*, 994 F.2d 1058, 1067-68 (3d Cir. 1993); 20 C.F.R. § 404.1529(b); ALJ's Decision at 7-8. Yet after

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[4] As discussed below, *see infra* at 20, the January 4, 1997 decision was incorporated by reference into the June 8, 1998 decision, except insofar as it was inconsistent with the later ruling. ALJ's Decision at 1.

considering at length Kish's subjective reports of pain, her daily activities, and her failure to continue aquatic therapy (which had previously proved an effective pain-reducing method), the ALJ found "her alleged symptoms and limitations to be somewhat exaggerated and therefore not fully credible." ALJ's Decision at 8. Put differently, the ALJ found that they too were not indicative of her complete incapacity from employment. This determination also was supported by substantial evidence. *See id.* at 7-8. Accordingly, insofar as Dr. Kaplan based his September 7, 1995 finding upon Kish's subjective reports of her condition, the ALJ was correct in finding that Kaplan's opinion was not entitled to controlling weight.

In sum, then, Dr. Kaplan's finding as to Kish's disability from all employment appears to have been an aberration in a pattern of findings that she was capable of fulfilling the requirements of some jobs, but merely was precluded from more strenuous work that did not afford her the opportunity to change positions as needed, including her previous job as a licensed practical nurse. Moreover, there does not appear to be a solid clinical foundation for this more extreme view. The ALJ was explicit and detailed in his consideration of the opinions issued by Dr. Kaplan, in his articulation of their shortcomings, and in his decision not to afford controlling weight to Kaplan's opinion as a result. *See Sykes*, 228 F.3d at 226 n.9 ("'Where the Secretary is faced with conflicting evidence, he must adequately explain in the record his reasons for rejecting or discrediting competent evidence.'" (quoting *Benton v. Bowen*, 820 F.2d 85, 88 (3d Cir. 1987))). After reviewing the record in this case, I find that a reasonable mind could accept the evidence on which the ALJ relied as adequate to support the result he reached. Accordingly, his decision not to consider Dr. Kaplan's opinions as having controlling weight was supported by substantial evidence.

2. The ALJ's Allegedly Improper Interpretation of Dr. Kaplan's Report

This argument essentially is a corollary to the above contention regarding the ALJ's failure to afford controlling weight to Kaplan's opinion. As stated, in explaining his refusal to do so, the ALJ indicated that this was based largely on the inconsistencies within Kaplan's various opinions. ALJ's Decision at 5-6. Especially instructive to the ALJ was the November 14, 1996 opinion which was found to implicitly contradict Kaplan's earlier finding that Kish is unable to work. Kish contends, however, that the ALJ's interpretation of that 1996 opinion was flawed. Specifically, she asserts that Kaplan's conclusion that Kish was able to "able to lift up to 20 pounds occasionally; sit up to three hours, stand/walk three to five hours, alternating positions at ½ hour intervals" did not indicate any capacity for gainful employment. Pl.'s Motion at 17-19. In fact, she claims, the 1995 and 1996 opinions are actually uniform in their indication of Kish's incapacity for all employment, and the decision to give the "1995 opinion no weight" consequently was improper. Pl.'s Objections at 10. She asserts that this misinterpretation of the 1996 opinion is evidenced by a clarifying letter submitted by Kaplan on July 7, 1998. Kish also argues that the 1996 opinion does not indicate that she is able to perform "light work," or that she can do so on "a regular and continuing basis," as a non-disabled person must be able to do under SSA regulations.[5] *Id.* (quoting 20 C.F.R. §404.1545(b)).

Before addressing the substance of Kaplan's 1998 letter, it is necessary to determine whether it bears at all upon the inquiry to be made by this court. The ALJ's determination–which ultimately became the Commissioner's final decision in this matter–was

[5] SSA regulations require an individual to perform a given variety of work on a "regular and continuing basis" in order to preclude a finding of disability. 20 C.F.R. § 404.1545(b).

issued on June 8, 1998. Accordingly this letter was not part of the administrative record before him at that time. It was, however, part of the record at the time of the Appeals Council's denial of review. In its recent holding in *Matthews v. Apfel*, 239 F.3d 589 (3d Cir. 2001), the United States Court of Appeals for the Third Circuit addressed for the first time the issue of whether evidence not presented to the ALJ, but made part of the record for the Appeals Council's review, should be considered by a district court in determining whether the decision of the ALJ was supported by substantial evidence. It concluded that such evidence should be considered only if good cause is shown by the claimant for her failure to present it to the ALJ. The court found persuasive the reasoning of the Seventh Circuit in *Eads v. Sec'y of HHS*, 983 F.2d 815, 817 (7th cir. 1993), wherein that court stated:

> It might seem . . . that the district judge and we would be free to consider the new evidence that was before the Appeals Council in deciding whether the decision denying benefits was supported by the record as a whole. And of course this is right when the Council has accepted the case for review and made a decision on the merits, based on all the evidence before it, which then becomes the decision reviewed in the courts. *It is wrong when the Council has refused to review the case.* For then the decision reviewed in the courts is the decision of the administrative law judge. The correctness of that decision depends on the evidence that was before him. He cannot be faulted for having failed to weigh evidence never presented to him . . . .

Matthews, 239 F.3d at 593 (quoting *Eads*, 983 F.2d at 817) (emphasis added). The Third Circuit also noted that "sound public policy" supported its holding, stating that "[w]e should encourage disability claimants to present to the ALJ all relevant evidence concerning the claimant's impairments. If we were to order remand for each item of new and material evidence, we would open the door for claimants to withhold evidence from the ALJ in order to preserve a reason for remand." *Id.* at 595. Consistent with these rationales, the court concluded that claimants are

required to present all material evidence to the ALJ, and that judicial review of new evidence is precluded, except where there is good reason for not having brought it before the ALJ.

Thus, for Kaplan's letter of July 7, 1998 to be considered by this court, it must appear that Kish had "good reason" for failing to present it earlier. I have little difficulty concluding that such reason is lacking here. At the time of the ALJ's decision, over fifteen of Kaplan's opinions had been made part of the record, and Kish certainly was free to supplant these with any other diagnoses that she felt would be helpful to the Commissioner. Yet despite the fact that this letter was merely a clarification of the evidence that already had been submitted[6]–i.e. did not constitute a new assessment in and of itself–she did not procure it prior to the ALJ's ruling. There is no apparent reason for her failure to seek earlier clarification from Dr. Kaplan except for the negative decision of the ALJ. To find the requisite good reason to exist under these circumstances would be to blatantly disregard our Court of Appeals's concern with discouraging claimants from failing, ex ante, to present evidence that could have been obtained prior to the ALJ's determination, and then advancing that evidence to challenge the decision ex post. *Matthews*, 239 F.3d at 595. Accordingly, I will not consider Kaplan's July 7, 1998 letter in connection with today's decision.

As for the contention that the ALJ misinterpreted Kaplan's opinions in concluding that Kish was capable of some forms of light work, such simply is unpersuasive. Preliminarily, it is worth noting that the ALJ's ultimate findings as to Kish's physical capabilities were not vastly

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[6] I recognize that Kish has referred to this letter as "non-cumulative," Pl.'s Written Objections at 11, but I disagree with this characterization. It discusses the results of no new examination or procedure, but instead summarizes her condition during the five years that she had been under Kaplan's care.

different from those espoused by Dr. Kaplan. To reiterate, in this case the ALJ found that Kish was able to lift up to twenty pounds at a time, to stand/walk for approximately two hours in an eight hour workday, and to sit for roughly the other six hours. He also recognized her need to alternate positions. ALJ's Decision at 8. In his November 14, 1996 assessment, Kaplan opined that Kish "could lift up to 20 pounds occasionally; sit up to three hours, stand/walk three to five hours, alternating positions at ½ hour intervals." *Id.* at 5-6. While these assessments are not precisely co-extensive, they are not drastically opposed, and moreover I have already indicated the reasonableness of not treating Kaplan's opinion as controlling. Additionally, Dr. Wander believed that Kish was able to stand, walk or sit for about six hours in an eight hour work day. Tr. at 122. Thus the ALJ's assessment of Kish's capacity–in absolute terms–was roughly consonant with Kaplan's opinions, and was rooted in substantial evidence in the administrative record.

To the extent that Kish argues that someone with the capacities that the ALJ found her to possess cannot, as a matter of law, be considered able to perform light work, and to do so on a "regular and continuing basis," this is unsupported by governing precedent. Under SSA regulations, "light work"

> involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities.

20 C.F.R. § 404.1567(b). In this case the ALJ found that Kish was capable of returning to her

past employment as a filing secretary, or serving as a security monitor or a small parts assembler, ALJ's Decision at 9, each of which qualifies as light work under the C.F.R.

Kish cites the Third Circuit's holding in *Stunkard v. Sec'y of HHS*, 841 F.2d 57 (3d Cir. 1988), for the proposition that an individual who is capable of sitting for three hours, standing/walking for three hours, lifting twenty-five pounds and occasionally climbing and balancing is not capable of performing light work regularly and consistently. 20 C.F.R. § 404.1545(b). Yet *Stunkard* is distinguishable from the instant matter. In that case, the ALJ found that the claimant, who possessed the limitations described immediately above, was capable of performing a "full range of light work." 841 F.2d at 61. This finding was unsupported by the uncontroverted assessment of the claimant's physical capabilities, and was actually contradicted by the fact that the claimant became decreasingly able to perform house or yard work as his capacity to "push or pull" waned.[7]

In this case, by contrast, the ALJ recognized that Kish is incapable of performing many tasks that would fall within the rubric of "light work." *See, e.g.*, ALJ's Decision at 5 (noting Kish's residual functional capacity to be for "less than light work"). For example, he explicitly recognized her need for a sit/stand option.

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[7] While it did not appear to govern his conclusion, the ALJ noted in this case that upon her initial interview on September 29, 1993, Kish did report that she was able to do "light housework, some cooking and shopping for short periods of time . . . [and] to drive for short distances." ALJ's Decision at 8. He further indicated that Kish also spends time reading, watching television, sitting on the porch with a neighbor, doing her housework "a little at a time" and caring for a dog and kitten. *Id.* at 7. He recognized, however, that this assessment was contradicted at the hearing, where she was described as unable to perform any household chores. *Id.* Additionally, Kish's husband reported that he prepares her meals for her when he is present, but admitted that he is away for two nights a week. *Id.*

Instead, he found her to be capable of performing three discrete tasks within the broader universe of "light work" that are suitable to an individual with her particular afflictions. Unlike *Stunkard*, where the claimant's physical limitations–i.e. the inability to push or pull–clearly precluded him from performing some of the tasks of which the ALJ adjudged him capable of performing, here the ALJ tailored Kish's set of feasible jobs to include only those that were compatible with her back condition. Accordingly, *Stunkard* does not establish a per se rule regarding individuals with the physical limitations of the claimant in that case and the ability to perform light work. Rather, as with all cases of this variety, that holding was concerned with a discrepancy between the precise capacities possessed by the claimant then at bar and those required to perform the tasks that the ALJ deemed him capable of performing. It does not invalidate the ALJ's conclusion in this case that Kish is capable of being a filing secretary or a security monitor.

Nor does anything in the administrative record indicate that she is unable to perform these tasks on a "regular and continuing basis." While she clearly is not capable of performing every variety of light work, there is no indication in the record that those that are within her capacity (i.e. those that permit her to shift positions at the required intervals) can be so considered only for abbreviated periods of time.[8]

Accordingly, the ALJ did not misinterpret Dr. Kaplan's report in any way that renders his denial of DIB benefits unsupported by substantial evidence or contrary to governing

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[8] I recognize that in his July 7, 1998 letter Kaplan indicated that on "bad days" Kish "is really not functional at all." However, as stated, this letter was outside the scope of the ALJ's consideration, and is beyond the cognizance of this court as well.

law.

3. The ALJ's Alleged Failure to Discuss All of Dr. Kaplan's Opinions

Kish asserts that the ALJ failed to discuss Dr. Kaplan's multiple opinions that she is disabled, and that the failure to discuss these opinions constitutes reversible error. She makes the same claim regarding the ALJ's failure to specifically mention the EMG performed on January 11, 1996.

Both of these contentions can be rejected out of hand. First, as stated, a finding of statutory disability is actually a legal determination, and is not medical in character. *Schwartz*, 134 F. Supp.2d at 650. Accordingly they are entitled to no special consideration by the ALJ, and his failure to afford them such is hardly error; rather such is precluded by federal law. 20 C.F.R. § 404.1527(e). Those opinions of Dr. Kaplan that are properly considered medical in nature were fully considered by the ALJ, and ultimately were afforded significant, though not controlling weight. As for the failure to explicitly mention the 1996 EMG, this is not reversible error because the ALJ expressly credited the result of that procedure. ALJ's Decision at 3 (finding Kish to suffer from "chronic pain syndrome secondary to chronic lumbar and cervical nerve root irritation with radiculopathy, which are found to be severe impairments"). The failure to credit the January 11, 1996 test as the source of this diagnosis is thus irrelevant to the question of whether his finding that Kish was not disabled was supported by substantial evidence.

4. The ALJ's Alleged Failure to Point to Contrary Medical Evidence in Disregarding Dr. Kaplan's Opinion

Kish contends that the ALJ did not point to any contrary medical evidence in disregarding Dr. Kaplan's opinion. She points to the Third Circuit's recent opinion in *Morales v. Apfel*, 225 F.3d 310 (3d Cir. 2000), as support for the proposition that an ALJ must rely upon an objectively inconsistent medical opinion if he is to disregard that of a treating physician. Failure to do so by the ALJ in this case, she posits, is ground for reversal.

Without reiterating that Dr. Kaplan's finding of complete disability is contradicted by at least one of his own subsequent opinions, Kish's contention fails because the ALJ was explicit in stating that he did not disregard Dr. Kaplan's opinion. ALJ's Decision at 5 ("As reflected below, substantial weight has been assigned to Dr. Kaplan's opinion which establishes a residual functional capacity for less than light work."); *id.* at 6 ("[T]he persuasive weight assigned to Dr. Kaplan's opinion is limited to the extent that it is supported by objective medical evidence . . . ."); *id.* at 8 ("[I]t is noted that Dr. Kaplan's assessment of November 1996 limits the claimant to lifting and carrying up to 20 pounds on an occasional basis."). Accordingly, whether or not he would have been justified in wholly disregarding Kaplan's opinion, that is not what the ALJ did in this case. For this reason, the cases cited by Kish are inapposite to the instant facts.

For example, in *Morales*, the court was explicit in holding that an ALJ "may *reject 'a treating physician's opinion outright* only on the basis of contradictory medical evidence . . . .'" 225 F.3d at 317 (emphasis added). The court went on to indicate that instead of basing this treatment of the examining physician's opinion upon such objective considerations, the ALJ in that case did so "simply because he did not believe [the claimant's] testimony at the

hearing and because [those physicians] noted that [the claimant] appeared to be malingering in their examinations of him." *Id.* at 318. Here, by contrast, the ALJ did not reject Kaplan's opinion outright, but merely failed to afford it controlling weight. Moreover, he did so based upon inconsistencies among Kaplan's own opinions and his failure to cite objective sources for his conclusion that Kish was completely disabled from all employment, not upon his own credibility assessments.

Consequently, this contention also is without merit.

B. The ALJ's Allegedly Erroneous Conclusion that Kish's Condition Does Not Meet or Equal Listing 1.05(C) (Disorders of the Spine)

Kish asserts that her condition meets/equals Listing 1.05(C) (*Disorder of the Spine - Other Vertebrogenic Disorders*) in 20 C.F.R. Pt. 404, Subpt. P, App. 1 (1999).[9] She further alleges that the ALJ failed even to mention in his report either this particular disorder or the reasons for his finding that her physical state is not equal to it. Instead she points to his conclusory statement that "the evidence of record fails to establish, at all times relevant to this decision, that the claimant's impairments, either singly or in combination, meet or equal any of the relevant listings . . . ." ALJ's Decision at 4. Kish then draws the court's attention to the recent decision of the court of appeals in *Burnett v. Apfel*, 220 F.3d 112, 119-20 & n.2 (3d Cir. 2000). In that case, the ALJ's report skimmed over the third step in the five step analysis, stating

[9] If a claimant is to be found to suffer from this disorder, it must be established that the following two symptoms have persisted for at least 3 months despite prescribed therapy and are expected to last 12 months: 1) pain, muscle spasm, and significant limitations of motion in the spine; and 2) appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss. 20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 1.05(C).

merely that "[a]lthough [claimant] has established that she suffers from a severe musculoskeletal [impairment], said impairment failed to equal the level of severity of any disabling condition contained in Appendix 1 . . . ." *Id.* at 119. The court held that because the ALJ's determination was so devoid of evidentiary support for the conclusion reached, it was "hopelessly inadequate" and "beyond meaningful judicial review." *Id.* at 119-20. The Third Circuit remanded the case with instructions for the ALJ to more fully develop the record, "identify the relevant listed impairment(s)," explain his findings, and to make explicit "whether and why" the claimant's impairments were "not equivalent in severity to one of the listed impairments." *Id.* at 120 & n.2; *see also Fargnoli*, 247 F.3d at 40 n.4 (noting the importance of a detailed explanation for an ALJ's conclusion as to whether a claimant's disorder is of listing level). Kish contends that the instant facts are squarely analogous to those at bar in *Burnett* and that consequently, as a matter of law, the ALJ's conclusion at step three was unsupported by substantial evidence.

At first blush, this argument appears to be compelling. This is because at first glance the ALJ's decision in this case seems to feature a conclusory statement regarding Kish's condition, and its relation to the listed impairments, of precisely the same sort as that present in *Burnett* Yet upon closer examination it becomes apparent that the ruling in the instant case actually contains much more. At the outset of his June 8, 1998 decision, the ALJ incorporated by reference, to the extent they were consistent with the substance of that decision, the findings of fact and conclusions of law set forth in his prior decision of January 4, 1997. ALJ's Decision at 1. In that earlier decision, the ALJ discussed at length the evidence of record regarding Kish's spinal condition in order to determine whether it constituted a listing level impairment. He stated:

The medical evidence fails to establish that any of the claimant's impairments have been of sufficient severity such as to meet the severities of any of the impairments described in Appendix 1. Further, considering the medical evidence of record and the opinions of physicians employed by the State Agency, it is my opinion that the claimant's impairments, either singly or in combination, have not been equivalent in severity to any of the impairments contained in Appendix 1.

. . .

Following the claimant's original complaints of work-related injuries in 1990, Magnetic Resonance Imaging (MRI) was performed on the claimant on December 6, 1990 . . . . The MRI of the lubosacral spine was read as a normal examination. There was no evidence of disc herniation, spinal stenosis, or other significant bony or soft tissue abnormality at any of the levels visualized.

Then, on March 18, 1993, another MRI of the claimant's lumbosacral spine was again read as a normal MRI examination - no significant change since December 6, 1990. The visualized intervertebral discs were normal in size, configuration and signal intensity with no evidence of herniation. There was no evidence of significant spinal stenosis. Normal lumbar lordosis was maintained. The visualized vertebral were without evidence of fracture, subluxation or destructive lesions. The conus medullaris was normal in location and appearance.

Then, on April 7, 1993, an MRI of the cervical spine was read as normal in appearance. The normal cervical lordosis was maintained. The cervical vertebrae were without evidence of fracture, subluxation, or destructive lesions. The cervical intervertebral discs were normal in appearance with no evidence of herniation. The cervical spinal cord was normal in size, configuration, and signal intensity, without evidence of intramedullary masses. The prevertebral soft tissues were normal in appearance, as were the visualized posterior fossa structures.

Finally, on February 14, 1994, MRI's of the claimant's cervical and lumbosacral spines showed small central spondylitic discs at C4-5 and C5-6, causing mild to moderate indentation of the thecal sac, but no evidence of cord compression or abnormal signal from the cord. The visualized neural foramina were patent. The vertebral bodies were of normal height and normal marrow signal. There was no evidence of malalignment. The cerebellar tonsils and fourth ventricle were unremarkable. Also at L4-5 a small central herniated disc mildly indented the thecal sac. There were no other disc herniations. The visualized neural

> foramina were patent. There was no evidence of spinal stenosis. The vertebral bodies were of normal height and normal marrow signal. There was no evidence of malalignment. The conus medullaris ended at the level of L1 and was grossly unremarkable.

ALJ's Decision of January 4, 1997 at 2-3. The ALJ then proceeded in the next four pages of his report to engage in a more wide-ranging evaluation of her physical and mental condition, including both her objective and subjective ailments. During this discussion he revisited the issue of her spinal condition multiple times. *See, e.g., id.* at 6 ("Trigger points were identified in the cervical, scapular and lumbar regions. Dr. Kaplan's impression was [c]hronic cervical and lumbosacral radiculopathy.").

Given the extensive degree to which the ALJ evaluated Kish's condition as a means of determining whether such constituted a listing level impairment, it seems clear that this case is not in complete factual accord with *Burnett*. It is true that, contrary to the *Burnett* court's admonition, the ALJ failed to identify with specificity the listing disorder most likely applicable to Kish's condition. This certainly is undesirable from the perspective of reviewability, and is a practice that should be avoided in the future. Yet the question is whether this omission, standing alone, mandates a remand. I conclude that under *Burnett* it does not.

It is apparent from a reading of the ALJ's January 4, 1997 decision that the listing disorder guiding his evaluation of Kish's spinal condition was listing 1.05(C). Every malady upon which he focused in the above-quoted discussion falls within the rubric of that listing. In fact, the very examples contained in Listing 1.05(C) as representative of the disorders within that category were discussed in the January 4, 1997 decision. ALJ's Decision of January 4, 1997 at 2-3 (focusing upon spinal stenosis and herniation of the vertebral bodies). His failure to mention

by name Listing 1.05(C) was semantic only, as he constructively mentioned it in substance. Indeed this is not like many other cases where a remand was mandated by the ALJ's unexplained failure to explicitly consider some substantive piece of evidence or some individual's opinion. *See, e.g., Coria v. Heckler*, 750 F.2d 245, 248 (3d Cir. 1984); *Cotter v. Harris*, 642 F.2d 700, 704 (3d Cir. 1981). Thus, the question becomes: What would be the task of the ALJ on remand? Certainly it is not necessary to afford him the opportunity to state explicitly that he was concerned with Listing 1.05(C) when that already is apparent in the substance of his decision.

In *Burnett*the ALJ was directed to develop the record as to whether and why the claimants impairments were "equivalent in severity to one of the listed impairments." 220 F.3d at 120. In this vein, Kish argues that the ALJ failed not only to consider Listing 1.05(C) by name, but also to make explicit findings as to why her condition was not equivalent to that listing. She asserts that I should remand the case so that he may do so.

Here it is worth recalling that the reason for the remand order in *Burnett*was that the cursory nature of the ALJ's step three conclusion rendered his decision "beyond meaningful judicial review." 220 F.3d at 119. While it is true that in this case the ALJ never expressly stated why Kish's condition falls short of the requirements of the listing, his reasoning–like the name of the listing with which he was concerned–is discernible in his detailed analysis of her physical capacities.[10] *Cf. Cerar v. Sec'y of HHS*, 1995 WL 44551, at *4 (E.D. Pa. Feb. 1, 1995)

[10] To reiterate, in order to establishing that a claimant meets the requirements of Listing 1.05(C), she must show that two symptoms have persisted for at least 3 months despite prescribed therapy and are expected to last 12 months: 1) pain, muscle spasm, and significant limitations of motion in the spine; 2) appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss. Importantly, "to show that [an] impairment matches a listing, it must meet *all* of the specified medical criteria. An impairment that manifests only some of those criteria, no matter how severely, does not qualify." *Sullivan v. Zebley*, 493

(holding that although the ALJ failed to explicitly address the credibility of a witness testifying as to the claimant's medical condition, a remand was not necessary "because the ALJ demonstrated he considered and analyzed all the medical evidence and plaintiff's subjective testimony concerning pain"). As such, I am able to determine whether that reasoning was supported by substantial evidence. Indeed, were I to remand the case, it seems abundantly clear that the ALJ would simply add a sentence to his report concluding that, as amalgamated, the plentiful evidence of her condition that is recounted in his January 4, 1997 report does not indicate that the criteria for listing 1.05(C) are met here. Thus, as with his failure to specifically mention that listing, I conclude that *Burnett*does not require me to remand based on the ALJ's failure to linguistically connect the evidence of Kish's condition with his conclusion that her condition does not reach listing level.

In sum, the characterization of the ALJ's decision in *Burnett*does not apply to the decision before me today: it is not beyond meaningful judicial review. Though it is not specifically named, I can easily determine what listed disorder was being considered as potentially equivalent to Kish's symptoms, and why such equivalence ultimately was found not to exist. Under these circumstances, I find that the ALJ's conclusion that Kish's condition does

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U.S. 521, 530 (1990). As applied to Kish's case, this maxim indicates that if the ALJ found any component of those two symptoms to be missing, this is sufficient reason to find that her impairment is not of listing level.

It is apparent that the medical findings in the January 4, 1997 decision reveal nothing approaching a condition that would satisfy the criteria for listing 1.05(C). For one of many possible examples, they reveal no reflex loss; indeed, elsewhere in that decision the ALJ states that "her deep tendon reflexes were symmetrical," that "[h]er reflexes were normal in her upper extremities," and that "[h]er knee jerks were equal." ALJ's Decision of January 4, 1997 at 6. These findings are not contradicted by anything in his subsequent report, and are accordingly part thereof. *See* ALJ's Decision at 1.

not constitute a listing level disorder was supported by substantial evidence, and that *Burnett* does not mandate a remand.

C. The ALJ's Alleged Failure to Properly Evaluate Kish's Residual Functional Capacity and His Posing of a Flawed Hypothetical Question to the Testifying Vocational Expert

Finally, Kish asserts that the ALJ misinterpreted her residual functional capacity to perform limited light work because he failed to consider her lumbar and cervical disorders and the medication that she was taking. She claims that he also failed to consider the effect of her cervical radiculopathy on her ability to reach and handle objects. She also alleges that the hypothetical posed to the vocational expert at the hearing was predicated upon these various misevaluations, and that his reliance on the vocational expert's response accordingly was improper.

These claims are without merit. The ALJ explicitly considered her lumbar and cervical nerve root irritation with radiculopathy, and credited both as being severe impairments. ALJ's Decision at 3. He also expressly addressed her alleged problems with her left hand, and concluded that because Dr. Kaplan placed no restrictions on the use of the hand and there were no clinical findings to support Kish's allegations of pain in the hand, this was not a severe impairment. Moreover, in his January 4, 1997 decision, he expressly focused on the condition of both her cervical and lumbar spine, and these conclusions also were made part of his June 8, 1998 decision as indicated above. Because the ALJ's consideration of these factors in his assessment of Kish's condition was based upon substantial evidence, the hypothetical question that was predicated upon that assessment was similarly appropriate.

IV. Conclusion

Because there is substantial evidence in the administrative record to support the Commissioner's decision to deny Kish disability benefits, and because the Commissioner has not committed any of the errors of law suggested by Kish, and I will approve and adopt the Chief Magistrate Judge's report and recommendation.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ADRIENNE KISH, Plaintiff,	:	
v.	:	CIVIL ACTION
LARRY G. MASSANARI, Acting Commissioner of the Social Security Administration, Defendant.	:	NO. 00-CV-1765

Order

And now, this ___ day of October, 2001, upon consideration of the parties' cross-motions for summary judgment (Docs. # 11, 12), and after review of the administrative record, the Chief Magistrate Judge's report and recommendation (Doc. # 16), and the plaintiff's objections thereto (Doc. # 17), it is hereby ORDERED AND DECREED that:

1. The report and recommendation is APPROVED AND ADOPTED;
2. The plaintiff's motion for summary judgment is DENIED;
3. The defendant's motion for summary judgment is GRANTED; and
4. Judgement is entered affirming the decision of the Commissioner of Social Security.

_____

William H. Yohn, Jr., Judge